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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 282

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROGUE RIVER TRIBE OF INDIANS, ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, The Confederated Bands of the Umpqua Tribe of Indians and the Calapooias residing in Umpqua Valley, pray that the petition for writ of certiorari to review the judgment of the Court of Claims entered in this case on April 3, 1950, be denied.

Opinion Below

The opinion of the Court of Claims (R. 90-100) is reported at 89 F. Supp. 798.

Jurisdiction

The judgment of the Court of Claims was entered on April 3, 1950 (R. 103-104). On June 23, 1950 this Court extended the time for filing the petition to August 30, 1950.

Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1255.

This Court has no jurisdiction to review the second question presented by the petition (Pet. p. 2) inasmuch as it was decided in an earlier case between the same parties (105 C. Cls. 495) and is now res judicata.

Questions Presented

The questions presented by the petition may be restated as follows:

1. Whether the final judgment in the earlier case providing for just compensation operates as res judicata and a bar to relitigation of the question of respondents' right to recover or whether it merely establishes the "law of the case".

2. If the latter, whether the prior decision of the Court of Claims that there was a taking of respondents' lands under the Fifth Amendment is so "clearly erroneous" as to warrant reconsideration at this time.

3. Whether the court below properly ascertained values.

Statute Involved

The pertinent portions of the Jurisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), Sep-

tember 19, 1853 (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 29, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143), and December 21, 1855 (12 Stat. 981), may have against the United States; * * *

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * *.

Treaty Involved

The pertinent portions of the Treaty of November 29, 1854 entered into with The Confederated Bands of the Umpqua Tribe of Indians and Calapooias residing in the Umpqua Valley, 10 Stat. 1125, are set forth in the petition (Pet. pp. 2, 3).

Statement

The statement in the petition with reference to the ratified Treaty of November 29, 1854 is incorrect insofar as it suggests that "these Indians ceded to the United States all lands claimed by them in the Oregon territory" (Pet. p. 4). The 67,820 acres constituting the reservation were not ceded; they were in fact specifically excepted or reserved from the cession (see proviso to Article 1 of treaty, Pet. pp. 2-3; also Opinion of Court, R. 71).

The characterization of the first case (105 C. Cls. 495) as a preliminary one, that is, as being on the "preliminary" question of liability may be misleading (Pet. pp. 5-6). On February 4, 1946 the Court of Claims entered its final judgment holding that the respondents were entitled to recover a money judgment of $14,315.88 and just compensation for that portion of the reservation (sometimes referred to as Umpqua Reservation) which was actually occupied by them at the time of their removal by the United States (R. 68).

The court found as a fact that no other Indians were designated to reside on the Umpqua Reservation and that the respondents were, within the meaning of their treaty, in actual occupancy of all the land reserved to them in the first article of the treaty. (Finding 2, R. 77-80, 91). The Solicitor General accepted the decision in the first case and made no effort to obtain a review by the Supreme Court.[1]

The second case (the present one) proceeded under Rule 39(a) of the Court of Claims which provides for a separation of the issues relating to the right to recover from those relating to the amount of recovery.

Reasons for Denying the Writ

1. The earlier case did more than establish the "law of the case", it finally adjudicated the basic question of liability. It operates as a bar to relitigation of the question of respondents' right to recover. *Hill* v. *Chicago & E. R. Co.*, 140 U. S. 52; *Scriven* v. *North*, (C. C. A. 4) 134 Fed. 366; *Mayer* v. *White*, (C. C. A. 8) 12 F. 2d 710; *Smith* v. *Vulcan Iron Works*, 165 U. S. 518. See the recent case of *Dickinson* v. *Petroleum Conversion Corp.*, 94 L. ed. 280, which cites the *Hill* case with approval. See also Stern and Gressman, Supreme Court Practice, "Finality as to separable matters", pp. 63, 64.

The judgment in the earlier case was partly final and partly interlocutory. Upon findings of fact, which were made part of the judgment, the court determined as a matter of law, that certain of the plaintiffs were entitled to recover, but left the issue of the amount of recovery and the amount of offsets in the case of the Confederated Bands of the Umpqua Tribe of Indians and the Calapooias residing in

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[1] In the case of *United States* v. *Alcea Band of Tillamooks, et al.*, which arose under the same jurisdictional act, the Solicitor General sought and obtained a review of the question of liability. 329 U. S. 40.

Umpqua Valley (respondents) to future litigation (R. 68). The judgment of the Court of Claims was interlocutory only as to the separable issue of the amount to be paid; as to the issue of liability, it must be regarded as final, for purposes of res judicata. *Bee Mach. Co.* v. *Freeman*, C. C. A. Mass., 131 F. 2d 190, aff. 319 U. S. 448; *Tuolumne Gold Dredging Corp.* v. *Walter W. Johnson Co.*, D. C. Cal., 71 F. Supp. 111.

There is a difference between adherence to the law of the case and res judicata; "one directs discretion, the other supersedes it and compels judgment". *Southern R. Co.* v. *Clift*, 260 U. S. 316. See *U. S.* v. *U. S. Smelting Co.*, 94 L. ed. 488, 496.

"The general proposition that a judgment or decree of a court of competent jurisdiction between the same parties, and all parties privy thereto, upon the same issues, is, as a plea, a bar, or as evidence conclusive, is well settled. Whenever a cause has been once fairly tried, fully heard, and finally decided, upon its merits, by a competent tribunal, the same questions, as between the same parties or their privies in interest, ought not to be tried over again. They should be considered as forever settled. This rule is necessary for the repose of society." *General Chemical Co.* v. *Standard Wholesale Phosphate & Acid Works*, C. C. A. 4, 101 F. 2d 178, 182, quoting *Norton* v. *San Jose Fruit-Packing Co.*, C. C. A. 9, 83 F. 512, 514.

For more than a decade this case has made its slow way through the courts on the assumption (by all concerned) that Rule 39(a) of the Court of Claims, making the amount of recovery a severable matter, was a valid and salutary rule. It provides that "In every Indian case * * * the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its *judgment adjudicating that right*. If the court holds in favor of the plaintiff, the

judgment shall be in the form of an interlocutory order, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings * * *" (Italics supplied.)

The present case was heard under this rule and on February 4, 1946 the Court of Claims entered a final judgment dismissing the complaint as to two of the plaintiffs, concluding that six plaintiffs were entitled to recover money judgments and that respondents were entitled to recover for the taking of their lands; only the amount of respondents' recovery was reserved for further proceedings. (R. 67-68)

The judgment was entered after a long trial, the filing of an opinion, findings of fact and conclusions of law. The petitioner did not appeal to the Supreme Court from this judgment.

This presents a situation analogous to that passed upon by the Supreme Court in *Hill* v. *Chicago & E. R. Co.*, 140 U. S. 52. There the earlier decree dismissed the bill against several defendants and referred the cause to a Master to ascertain the amount due by the other defendants. From this decree the complainant prayed an appeal but failed to perfect it. The Master then took testimony upon the subject of the amount to be paid and made his report. This was confirmed by the court who ordered the remaining defendant to pay complainant a specified sum of money. From this second decree the complainant appealed and asked the court to consider the matters determined by the earlier decree. In refusing this request the court said:

> We are of the opinion that the [earlier] decree * * * was a final decree, * * * as to all matters determined by it, and that they are closed against any further consideration. It disposed of every matter of contention between the parties, except as to the amount of one item and referred the case to a Master

to ascertain that. It dismissed the bill against several defendants for want of equity, and denied relief to the complainant upon all matters in controversy except as to that amount, and retained the case only as against the parties interested in that matter. The rights and liabilities of all the parties were in other respects determined.

But there was no adjudication as to the payment of the amount to be ascertained by the Master; and that remained unsettled. It was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of * * *. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment.

The mere fact that Rule 39(a) provides that the judgment "shall be in the form of an interlocutory order" does not make the judgment any less res judicata where it in fact determined the issue and settled the controversy. *Sewerage Commission of Milwaukee* v. *Activated Sludge,* 81 F. 2d 22; *Larkin Automotive Parts Co.* v. *Bassich Mfgr. Co.,* 19 F. 2d 944.

2. If the earlier case merely established the "law of the case," which we deny, the Court is nonetheless bound by the prior judgment. "There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." *Roberts* v. *Cooper,* 20 How. 467, 481; *U. S.* v. *Camou,* 184 U. S. 572,

574; see also *Eastern Cherokees* v. *U. S.*, 225 U. S. 572; *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255 and *Illinois ex rel. Hunt* v. *Illinois Central Railroad Company*, 184 U. S. 77, 92.

The decision on a prior appeal of the same case is held to be the law of the case, the remedy of the party deeming himself aggrieved being to seek a rehearing. *Maryland Casualty Co.* v. *City of Norfolk*, (C. C. A. 4), 54 F. 2d 1032, 1039. While the doctrine of the law of the case is not a limitation of power, the decision on former appeal "must be followed in all subsequent proceedings . . . unless that decision is clearly erroneous and works manifest injustice". *Chicago, St. Paul , M. & O. Ry. Co.* v. *Kulp*, 102 F. 2d 352, cert. den. 307 U. S. 636.

The judgment in the first case (105 C. Cls. 495) was in no sense erroneous; it was clearly in accordance with the decisions of this Court. *Shoshone Tribe* v. *U. S.*, 299 U. S. 476, 497; *U. S.* v. *Creek Nation*, 295 U. S. 103, 110.

Under the ratified treaty of November 29, 1854 (10 Stat. 1125) the respondents ceded to the United States all of the land they had occupied from time immemorial except 67,820 acres which they retained as a reservation.

The 67,820 acres were reserved for the respondents and such other bands "as may be designated to reside thereupon". The treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted. *U. S.* v. *Winans*, 198 U. S. 371, 381.

The Court found as a fact (Finding 2, R. 77-80) that no other Indians were ever designated by the United States to reside on the reservation and that in fact no Indians other than the respondents occupied said land. The reservation was never ceded to the government; the govern-

ment confiscated it.[2] The opinion of the Court of Claims states: "According to the terms of that treaty the bands of Umpquas and Calapooias reserved a specifically described tract of land and ceded a portion of the land which they owned. Since by no act of theirs did they apparently surrender the occupied part of the reserved tract, we are unable to find that their simple removal deprived them of their rights as stipulated in the treaty" (R. 71).

Petitioner alleges that the United States is only liable for a breach of contract, that is, for failure to sell the land for respondents' benefit. The answer to this is that there was a taking by the United States of the Indians' land for public use and they are entitled to recover just compensation. The tribal lands, as we have said, were confiscated by the United States.

The decision of this Court in the *Shoshone* case, 299 U. S. 476, 497, is a complete answer on this point.

The opinion states in part:

> "* * * Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U. S. 553, 564-566, 47 L. ed. 299, 305, 306, 307, 23 S. Ct. 216. *The power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . . ; for that "would not be an exercise of guardianship, but an act of confiscation."'* United States v. Creek Nation, supra (295 U. S. 110, 79 L. ed. 1335, 55 S. Ct. 681); citing Lane v. Santa Rosa, 249 U. S. 110, 113, 63 L. ed. 504, 506, 39 S. Ct. 185; Cherokee Nation v.

[2] The accounting report filed November 15, 1944 in the first case (105 C. Cls. 495) p. 111 states "It was decided to remove them [respondents] and their whole country was considered as ceded."

> Hitchcock, 187 U. S. 294, 307, 308, 47 L. ed. 183, 190, 23 S. Ct. 115. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.' * * *'' (Italics supplied).

The petitioner, beginning on page 9 of its petition, would like to retry the first case but has certified to this Court only the record in the second case. Petitioner desires to know: (1) why certain Indians were not moved east of the Cascades, (2) why the 1851 treaties were not ratified, (3) why other ratified and unratified treaties did not provide for permanent reservations, and (4) why certain exceptions were made in some of the treaties negotiated by Joel Palmer, Indian Superintendent.

These questions all involve respondents' right to recover which was adjudicated in the first case, and although quite immaterial can only be answered by reference to the record in the first judgment.

Petitioner's repeated references to other treaties, both ratified and unratified, are irrelevant and immaterial. As to certain other reservations created by other treaties being temporary the report of the Assistant Secretary of the Interior dated August 21, 1941 and filed in evidence by defendant in the first case had this to say:

> "In but one of the treaties were the Indians promised a reservation for their exclusive use (that of November 29, 1854). The other reservations were considered as temporary reservations and the lands were treated as ceded lands after the use for which they had been set aside had been made."

The ratified Treaty of November 29, 1854 is clear and unambiguous and needs "no other treaty history" to clarify its terms.

The cases cited by petitioner that interest cannot be charged against the government do not involve questions of

"just compensation". The instant case does not involve the recovery of interest as such.

The Supreme Court in *United States* v. *Klamath and Moadoc Tribes,* 304 U. S. 119, 123, stated:

> "* * * The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i. e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking. * * *"

The amount sufficient to produce the full equivalent of the value paid contemporaneously with the taking has been determined by using a reasonable interest rate. *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496, 81 L. ed. 360, 369; *Jacobs* v. *United States,* 290 U. S. 13, 17, 78 L. ed. 142, 144.

3. The petition fails to allege any errors of law committed by the court below in determining the value of the 67,820 acres as of December 21, 1855. Petitioner alleges that the Court of Claims used the value of $1.20 per acre in the *Alcea* case (Pet. p. 7) and concluded that the respondents' lands were worth 20¢ less. What the Court did was to consider all of the elements of value and determine that the respondents' land had a value of $1.00 per acre in 1855.

The judgment below was based solely on questions of fact; ordinarily this Court does not grant certiorari to review that type of judgment. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review . . . findings of fact by . . . courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.,* 336 U. S. 271, 275.

No such showing is made. In view of the statement (Pet. p. 7) that "if the $1.20 value found in Alcea is based on an erroneous standard, the same is true of the $1.00

value in this case"—it seems desirable to outline the extent and scope of the court's consideration of the question of value.

Both parties introduced the testimony of expert witnesses and much documentary evidence consisting of ancient documents, government reports, maps and histories.

The various elements of value offered by both petitioner and respondents related to circumstances existing in the area, and included the following: (1) the location of the lands and their physical characteristics; (2) the history of the Oregon Territory; (3) the development of the surrounding area at the time of the taking; (4) actual disposals of the tribal lands after the taking by the Government; (5) private sales of similar lands bordering on the Umpqua Reservation; (6) sales of land in the tribal area by the Oregon and California Railroad; (7) agricultural and timber value of the reservation (R. 93).

From this material the court made certain findings[3] and reached certain conclusions which may be summarized as follows (R. 77-89):

The tribal lands were located in the Umpqua Valley in Douglas County, Oregon. The Umpqua River enters the reservation near its southeast corner, flows through it in an irregular course to the north and northwest and thereafter empties into the Pacific Ocean. In the early history of Oregon the Umpqua River was an important avenue of transportation and second in importance in the state. It was navigable by ocean vessel from the ocean to Scottsburg which is about 20 miles from the reservation. The width of the river on the Umpqua Reservation is about 400 feet. (R. 80)

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[3] There were 13 separate findings of fact covering 15 printed pages.

While the greater part of the reservation is best adapted to the growing of timber, being located in what is known as the Douglas-Fir Region,[4] it contained some good agricultural and grazing land. The soil is fertile and well adapted to the growing of most farm crops, fruits and vegetables. There is an abundance of pure water, the climate is healthful and did not have extremes of heat and cold. (R. 80-81)

Settlement of Oregon Territory began in noticeable volume about 1838. Douglas County in which the tribal lands were located was created January 7, 1852. In 1860 the city of Roseburg, which was ten miles from the reservation, had a population of 835 people. Winchester, eight miles from the reservation, had a population of 412 people. (R. 81)

The roads in the tribal area in the early days were somewhat primitive. There was a pack trail from Scottsburg to Winchester and one along the Umpqua River running through the reservation. In 1856 General Sheridan constructed a useable road in the vicinity of the reservation for the purpose of moving ammunition and military equipment. (R. 81). In 1855 the Umpqua River could have been used for floating logs from the reservation to the Pacific Ocean but on account of certain rapids and shallow places between the reservation and Scottsburg in dry weather it would have been necessary to utilize splash dams. (R. 88)

By the Act of March 3, 1853 Congress authorized a survey for the purpose of ascertaining a feasible route for a railway from California to Oregon. The survey party passed through Douglas County in October, 1855 and the proposed route ran parallel to and about 12 miles from the reserva-

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[4] Douglas fir timber had a commercial value in 1855. (Finding 10, R. 87).

tion. By the Act of July 25, 1866 (14 Stat. 239) the Government made a grant of land to the Oregon and California Railroad Company as an aid for the construction of a railroad from California to Portland, Oregon. The railroad when constructed followed approximately the same route as was laid out in the survey of 1855. (R. 81-82)

The entire Umpqua Reservation lay within a portion of the "primary limit" lands granted to the railroad. Section 2 of the Act provided that the alternate sections of land retained by the Government would not be sold for less than $2.50 per acre. (R. 82)

Inasmuch as none of the land in the reservation was privately owned in 1855 there could be no sales between private buyers. There were sales of 63 tracts of land in Douglas County between April 1, 1856 and October 12, 1860 for an average price of $5.33 per acre. Twenty of these sales involved land located in townships adjoining the reservation and there were four sales of land in a township in which part of the reservation was located.[5] (R. 85)

The government withdrew from private entry approximately 31,000 acres of the tribal lands for land grants made to the Oregon and California Railroad Company. The act provided (16 Stat. 47) that the railroad might sell the lands granted to it, to settlers only, in quantities of not more than 160 acres to each purchaser and for a price not to exceed $2.50 per acre. The railroad violated the grant by selling at a price in excess of $2.50 per acre and a portion of the granted lands within the reservation were revested in the United States. (*Oregon and California Railroad Company* v. *United States,* 238 U. S. 393) (R. 82, 84).

The court concluded that in 1855 the reservation was

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[5] The four sales were in Township 25 S.R. 7 W. One deed is undated but two of the sales were made in 1857 and one in 1859. The average price per acre was $6.33. (Fuller Appraisal Plffs. Ex. 13).

located in an area where settlements on its edges were thriving and increasing in population. There was a demand for agricultural products and the timber of the area, and the court said "that if the timberlands on the reservation had been available and offered for sale by or around 1855, in tracts of sufficient size to attract the interest of lumber companies, most of the land would have been purchased particularly since people generally were aware of the promising future of the lumber industry in Oregon" (R. 98-99).

"From the record as a whole" the court concluded "that the lands taken had an average value of $1.00 per acre on December 21, 1855, taking into consideration the factors set forth above, the fact that some of the land was of little value then and today, and allowing for the reasonable costs of making all necessary surveys and supervising the disposition of the lands" (R. 99).

This may be in the nature of a jury verdict but that fact makes it all the more unassailable. *U. S.* v. *Wells,* 283 U. S. 102, 120.

Value depends on the circumstances of each case and no general formula can be used for the purpose. *U. S.* v. *Miller,* 317 U. S. 369, 374. In determining what property is worth the inquiry must be "viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted". *Miss. & Rum River Boom Co.* v. *Patterson,* 98 U. S. 403, 408, 25 L. ed. 206, 208.

"Just compensation includes all elements of value that inhere in the property . . . The sum required to be paid . . . is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or

likely to be needed in the reasonably near future is to be considered . . . ". *Olson* v. *U. S.*, 292 U. S. 246, 255.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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